

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

MICHAEL S. GORBEY,

Plaintiff,

v.

2:08 CV 121
(Maxwell)

UNITED STATES OF AMERICA;
UNITED STATES POSTAL SERVICE;
JON THOMA, Postmaster;

Defendants.

ORDER

It will be recalled that on December 12, 2008, *pro se* Plaintiff Michael S. Gorby initiated the above-styled civil action by filing a civil rights complaint pursuant to ***Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics***, 403 U.S. 388 (1971).

It will further be recalled that the case was referred to United States Magistrate Judge James E. Seibert in accordance with Rule 83.01, *et seq.*, of the Local Rules of Prisoner Litigation Procedure and 28 U.S.C. §§ 1915(e) and 1915A.

On May 29, 2009, Magistrate Judge Seibert issued a Report and Recommendation wherein he recommended that the Plaintiff's Complaint be dismissed with prejudice for failure to state a claim. Specifically, Magistrate Judge Seibert found that the Plaintiff's claims against the United States and the United States Postal Service must be dismissed because a ***Bivens*** cause of action may only be brought against federal officers in their individual capacities and not against federal agencies which employ the persons acting under federal law or the federal government itself. Additionally, Magistrate Judge Seibert found that the Plaintiff's claims against Postmaster John Thoma must be dismissed because the Plaintiff has

failed to allege facts that would tend to show that said Defendant was acting with an intent to deprive him of his property.

In his Report and Recommendation, Magistrate Judge Seibert provided the parties with ten days from the date of service of said Report and Recommendation in which to file objections thereto and advised the parties that a failure to timely file objections would result in the waiver of their right to appeal from a judgment of this Court based upon said Report and Recommendation

The Petitioner's Pro-Se Motion To Defer Court's Recommendation [sic] To Dismiss With Prejudice For Failure To State A Claim was filed on June 3, 2009, and docketed as Objections to Magistrate Judge Seibert's Report And Recommendation. Accordingly, this matter is now ripe for review.

Pursuant to 28 U.S.C. § 636(b)(1)(c), this Court is required to make a *de novo* review of those portions of the Magistrate Judge's findings to which objection is made. The Court is not, however, required to review, under a *de novo* or any other standard, the factual or legal conclusions of the Magistrate Judge as to those portions of the findings or recommendation to which no objections are addressed. **Thomas v. Arn**, 474 U.S. 140, 150 (1985). In addition, failure to file timely objections constitutes a waiver of *de novo* review and the Plaintiff's right to appeal this Court's Order. 28 U.S.C. § 636(b)(1); **Snyder v. Ridenour**, 889 F.2d 1363, 1366 (4th Cir 1989); **United States v. Schronce**, 727 F.2d 91, 94 (4th Cir. 1984).

As previously noted, on June 3, 2009, the Plaintiff filed his Objections to Magistrate Judge Seibert's Report and Recommendation. The Court has conducted a *de novo* review

only as to the portions of the Report and Recommendation to which the Plaintiff objected. The remaining portions of the Report and Recommendation to which the Plaintiff has not objected have been reviewed for clear error.

The Court finds that the issues raised by the Plaintiff in his Objections to Magistrate Judge Seibert's Report and Recommendation were thoroughly considered by Magistrate Judge Seibert in said Report and Recommendation¹. The Court is of the opinion that Magistrate Judge Seibert's Report and Recommendation accurately reflects the law applicable to the facts and circumstances before the Court in the above-styled action. Accordingly, it is

ORDERED that the Report And Recommendation entered by United States Magistrate Judge James E. Seibert on May 29, 2009 (Docket No. 10), be, and the same is hereby, **ACCEPTED** in whole and the above-styled civil action be disposed of in accordance with the recommendation of the Magistrate Judge. Accordingly, it is

ORDERED that the Plaintiff's Complaint (Docket No. 1) be, and the same is hereby,

¹It should be noted that in his Objections to Magistrate Judge Seibert's Report and Recommendation, the Plaintiff indicates that he did not receive a copy of said Report and Recommendation and only learned about its entry from a review of the docket sheet in his case, which he received from the Clerk's Office on June 3, 2009. The docket in this matter reflects that a copy of Magistrate Judge Seibert's Report and Recommendation was sent to him, via certified mail, on May 29, 2009, and was returned to the Clerk's office marked "Not Deliverable as Addressed" on June 4, 2009. The docket further reflects, however, that a copy of Magistrate Judge Seibert's Report and Recommendation was sent, via certified mail, to the Plaintiff at the new address he provided to the Clerk of Court on June 1, 2009 (Docket No. 11). Docket Entry Number 14 in this civil action reflects that the Plaintiff's copy of Magistrate Judge Seibert's Report and Recommendation was accepted on June 8, 2009. At no point after June 8, 2009, has the Plaintiff sought to file any additional objections to Magistrate Judge Seibert's Report and Recommendation beyond those that he filed on June 3, 2009, without the benefit of said Report and Recommendation.

dismissed with prejudice for failure to state a claim.

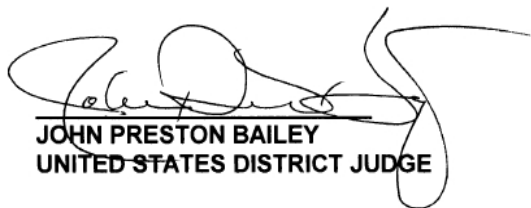
It is further

ORDERED that the Clerk of Court shall enter judgment for the Defendants. It is further

ORDERED that, should the Plaintiff desire to appeal the decision of this Court, written notice of appeal must be received by the Clerk of this Court within sixty (60) days from the date of the entry of the Judgment Order, pursuant to Rule 4 of the Federal Rules of Appellate Procedure. The \$5.00 filing fee for the notice of appeal and the \$450.00 docketing fee should also be submitted with the notice of appeal. In the alternative, at the time the notice of appeal is submitted, the Plaintiff may, in accordance with the provisions of Rule 24(a) of the Federal Rules of Appellate Procedure, seek leave to proceed *in forma pauperis* from the United States Court of Appeals for the Fourth Circuit.

The Clerk of Court is directed to transmit copies of this Order to the *pro se* Plaintiff and to any counsel of record.

DATED: July 7, 2010.



JOHN PRESTON BAILEY
UNITED STATES DISTRICT JUDGE